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In The

Supreme Court of the United States

ULLICO, INC., MRCO, INC., THE UNION LABOR LIFE INSURANCE COMPANY, FINANCIAL FREEDOM SENIOR FUNDING CORPORATION, and BEVERLY MIRTLE,

Petitioners,

vs.

CORINNE E. BLACK, Trustee,

Respondent.

On Petition For A Writ Of Certiorari To The California Court Of Appeal For The First Appellate District

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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41 pp

QUESTION PRESENTED

Does the Alternative Mortgage Transaction Parity Act preempt state law claims for elder abuse, fraud, and unfair business practices?

LIST OF PARTIES

PETITIONERS:

ULLICO Inc.; MRCo, Inc.; The Union Labor Life Insurance Company; Financial Freedom Senior Funding Corporation; and Beverly Mirtle.

RESPONDENT:

Corinne E. Black, Surviving Trustee of the Charles T. Black and Corinne E. Black Trust Agreement dated April 20, 1982.

OTHER:

Respondent is informed and believes that defendant James R. Mahoney, although not named as a petitioner, will file a joinder to the petition.

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STATEMENT OF THE CASE

In an action for elder abuse under California Welfare & Institutions Code §§ 15600, *et seq.*, unlawful business practices under California Business & Professions Code §§ 17200, *et seq.*, and fraudulent concealment against a number of nonfederally-chartered lenders and their employees, plaintiffs Charles and Corinne Black, as trustees of their marital trust, alleged that defendants made false and misleading disclosures and representations with respect to defendants' reverse mortgage transactions. The trial court granted defendants' motion for summary judgment on the grounds of federal preemption.

Holding that plaintiffs' claims were not preempted, the California Court of Appeal, First Appellate District, Division Two, unanimously reversed. *Black v. Financial Freedom Senior Funding Corp.*, 92 Cal.App.4th 917 (2001). Charles Black died during the pendency of the appeal; Corinne Black is the surviving trustee of the Blacks' marital trust and appears here in that capacity.

The California Supreme Court unanimously denied defendants' subsequent petition for review.

All of the defendants except James Mahoney now seek review by certiorari of a single issue: "Whether the California Court of Appeal violated the Preemption Clause by allowing state law claims attacking an alternative mortgage transaction made in full compliance with the Parity Act by a state-chartered housing creditor?"

The issue is more aptly framed as follows: Does the Alternative Mortgage Transaction Parity Act preempt

state law claims for elder abuse, fraud, and unfair business practices?

REASONS FOR DENYING THE WRIT

I. SUMMARY OF ARGUMENT

The California Court of Appeal's decision on the issue of federal preemption in this matter is fully supported by: (1) the intent of Congress as shown by the language of Alternative Mortgage Transaction Parity Act, 12 U.S.C. §§ 3801, *et seq.* (the "Parity Act") and its implementing regulations; (2) written interpretations of the subject regulations by the director of the Office of Thrift Services ("OTS"), the regulatory agency empowered to implement and administer the Parity Act; and (3) principles of federalism. There are no decisions of any court in conflict with the opinions expressed by the California Court of Appeal, and the decision of the California Court of Appeal adequately and correctly addressed each preemption issue before it.

Petitioners' secondary reliance on the Home Owners' Loan Act of 1933, 12 U.S.C. §§ 1461, *et seq.*, ("HOLA") is misplaced. Numerous published cases dealing with preemption issues arising under HOLA have uniformly held that state law fraud and unfair business practice claims similar to those of respondent's are not preempted.

As framed, the issue presented by the petitioners is not ripe for review. That issue is premised on the existence of a factual finding that the alternative mortgage transaction at issue was "made in full compliance with the Parity

Act," yet no such determination has ever been made by any court.

Petitioners fail to set forth a number of crucial matters contained in the record: (1) they present an argumentative factual recitation without disclosing that no factual determination of any kind has been made by the trial court and fail to accurately describe the allegations of respondent's complaint; (2) they fail to disclose that their own evidence raised a triable issue of material fact on whether they waived their preemption claims; (3) they complain that the trial court considered an interpretive letter from the OTS, yet do not disclose that they offered that very letter in support of their motion for summary judgment; (4) they do not reveal that they failed to offer any evidence to demonstrate that they have standing to raise the issue of preemption; and (5) they do not reveal the fact that their stance on the issue of preemption has been inconsistent.

Accordingly, the petition for certiorari should be denied.

II. THE CALIFORNIA COURT OF APPEAL PROPERLY CONSTRUED THE PARITY ACT AND ITS IMPLEMENTING REGULATIONS

A. The Scope of Preemption Under the Parity Act Is Limited

"Consideration of issues arising under the Supremacy Clause 'start[s] with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress.'" *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 120 L.Ed.2d 407, 112 S.Ct. 2608 (1992). The

"'historic police powers of the States'" extend to consumer protection in the area of unfair business practices. *California v. ARC America Corp.*, 490 U.S. 93, 101, 104 L.Ed.2d 86, 109 S.Ct. 1661 (1989).

Under the commerce clause, "both as a matter of history and as a matter of present commercial reality, banking and related financial activities are of profound local concern." *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 38, 64 L.Ed.2d 702, 100 S.Ct. 2009 (1980).

In determining whether a state law conflicts with federal statutes or regulations, the federal-state conflict must be actual and unavoidable, not merely possible. *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 336-337, 36 L.Ed.2d 280, 93 S.Ct. 1590 (1973).

After a thorough examination of the applicable law, the California Court of Appeal found that preemption of state-chartered lenders is extremely limited under the Parity Act, and held that "the Parity Act does not expressly, impliedly or through conflict preempt the Blacks' claims" of fraud, elder abuse, and unfair business practices. *Black,* 92 Cal.App.4th at 929-935.

As properly construed by the *Black* court, the Parity Act and its implementing regulations only preempt state laws in those areas which the OTS has deemed "appropriate" to federal regulation, leaving states free to regulate other aspects of alternative mortgage lending. *Black,* 92 Cal.App.4th at 927-932. Currently, only four areas have been identified by the OTS as "appropriate and applicable" to its exercise of regulatory authority: late charges, prepayments, adjustments to home loans, and disclosures for variable rate transactions. 12 C.F.R. § 560.220. All other regulations "are deemed inappropriate and inapplicable"

to the exercise of OTS' regulatory authority over alternative mortgage lending. 12 C.F.R. § 560.220.

B. Petitioners Ignore the Interplay Between 12 U.S.C. §§ 3803(a), 3803(c), and 3802

Petitioners point to 12 U.S.C. § 3803 as authority for their argument that all state regulation of nonfederally-chartered lenders is preempted. However, petitioners do not fully consider the interplay between 12 U.S.C. §§ 3803(a), 3803(c), and 3802.

Section 3803 merely gives authority to nonfederally-chartered lenders to make alternative mortgage loans and preempts states from denying those lenders the ability to make such loans. The Parity Act was enacted to prohibit state-by-state bans on alternative mortgages: "The Parity Act preempts State ***bans*** on certain 'alternative mortgage transactions,' by which is meant 'all manner of mortgage instruments that do not conform to the traditional fully-amortized, fixed-interest-rate mortgage loan.' [Citations and footnote omitted; emphasis added.]" *Grunbeck v. Dime Savings Bank, FSB*, 74 F.3d 331, 342 (1st Cir. 1996).

Petitioners' interpretation leads to the absurd conclusion that vast areas of the activities of state-chartered lenders cannot be regulated by the states even though the OTS has only chosen to regulate in the areas of late charges, prepayments, adjustments to home loans, and disclosures for variable rate transactions. *Black*, 92 Cal.App.4th at 929-930, 932.

Petitioners' argument contains a critical, unfounded, and unsupported assumption: state-chartered lenders are regulated in the same way as federally-chartered lenders,

and therefore federal laws and regulations apply in equal force to both. Petitioners cite no authority for such a sweeping presumption.

The Parity Act gave housing creditors the general authority to make, purchase, and enforce alternative mortgage transactions, including "reverse" or "equity sharing" mortgages. 12 U.S.C. § 3803. The specific authority allowing petitioners to make alternative mortgages is found in 12 U.S.C. § 3803(a)(3) which provides that the Parity Act only applies:

> "with respect to all other housing creditors, including without limitation, savings and loan associations, mutual savings banks, and savings banks, only to transactions made in accordance with regulations governing alternative mortgage transactions as issued by the Director of the Office of Thrift Supervision for federally chartered savings and loan associations, to the extent that such regulations are authorized by rulemaking authority granted to the Director of the Office of Thrift Supervision with regard to federally chartered savings and loan associations under laws other than this section."

The preemption provision of the Parity Act is found in 12 U.S.C. § 3803(c) which provides: "An alternative mortgage may be made by a housing creditor in accordance with this section, notwithstanding any State constitution, law, or regulation."

In *Black*, 92 Cal.App.4th at 930, the California Court of Appeal found this language to be susceptible to two interpretations when read in the context of other provisions of the Parity Act and its implementing regulations:

> "This language is susceptible to at least two interpretations. On one hand, the phrase 'state constitution, law, or regulation' is modified with the adjective 'any,' supporting the argument that the preemption provision precludes all state regulation of alternative mortgage transactions involving state-chartered creditors.
>
> "On the other hand, the phrase 'any state constitution, law, or regulation' can be interpreted as implicitly limited to those that prohibit or impede alternative transactions or that *conflict* with federal regulations deemed applicable to nonfederally-chartered housing creditors, i.e., the regulations that the transaction must be made 'in accordance with.' This interpretation would leave broad room for state regulation because there are only four federal regulations with which the transactions of housing creditors must comply. (See § 560.220.)"

The California Court of Appeal correctly identified the ambiguity and correctly reconciled it.

Under 12 U.S.C. § 3802:

> "A person is not a 'housing creditor' with respect to a specific alternative mortgage transaction if, except for this chapter, in order to enter into that transaction, the person would be required to comply with licensing requirements imposed under State law, unless such person is licensed under applicable state law and such person remains, or becomes, subject to the applicable regulatory requirements and enforcement mechanisms provided by State law."

Section 3802 would simply have no purpose if the Parity Act took all regulatory power away from the states.

In *Black*, 92 Cal.App.4th at 930, the California Court of Appeal observed:

> "Given the breadth accorded the states in regulating 'housing creditors' in 12 United States Code section 3802, the preemption language of 12 United States Code section 3803(c) can certainly be interpreted as not extending to state laws that concern aspects of those transactions other than those addressed by the four applicable federal regulations."

The *Black* court concluded with respect to preemption under the Parity Act, "the preemption language of the Parity Act does not contain a clear manifestation of congressional intent to preempt all state laws concerning the terms and marketing of alternative mortgage transactions. Absent such clear manifestation, the Parity Act does not expressly preempt claims such as those brought by the Blacks in this action." *Black*, 92 Cal.App.4th at 931.

This conclusion is in accord with established preemption jurisprudence. "As is always the case in our preemption jurisprudence, where 'federal law is said to bar state action in fields of traditional state regulation, . . . we have worked on the "assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."'" *California Div. Of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 325, 136 L.Ed.2d 791, 117 S.Ct. 832 (1997).

The *Black* court correctly found that there was no implied preemption because the "regulations deemed applicable to nonfederally-chartered housing creditors are so limited in number as to be insufficient to occupy the

field (see [12 C.F.R.] § 560.220)." *Black*, 92 Cal.App.4th at 931. This is in accord with *ITEL Containers Int'l Corp. v. Huddleston*, 507 U.S. 60, 70-71, 122 L.Ed.2d 421, 113 S.Ct. 1095 (1993), where this Court held that the federal regulatory scheme at issue was not sufficiently pervasive to occupy the field.

The *Black* court also correctly found that there was no conflict preemption of respondent's claims. *Black*, 92 Cal.App.4th at 931-933. The *Black* court found that respondent's claims do not "stand as an obstacle" to Congress' purpose in enacting the Parity Act, and "do not seek to prohibit or impede the making of alternative mortgage transactions that comport with the applicable federal regulations; they simply require adequate disclosures." *Black*, 92 Cal.App.4th at 933. Finally, despite petitioners' unsubstantiated contention, the *Black* court found that respondent's claims "do not tread on areas of federal regulation applicable to nonfederally-chartered housing creditors, namely, late charges, prepayments and prepayment penalties, loan adjustments, and disclosures for variable rate transactions." *Ibid.* Under such circumstances, conflict preemption "simply does not apply." *Ibid.*

C. The History of the Parity Act and Its Implementing Regulations Support the Interpretation of the California Court of Appeal

1. Preemption in 1994 Under Former 12 C.F.R. § 545.33

The history of the Parity Act and its implementing regulations support the ruling of the California Court of Appeal. In 1994, the Parity Act's enabling and preemption

regulation was contained in former 12 C.F.R. § 545.33(f) which provided:

> "(f) *Notice of housing creditors regarding alternative mortgage transactions.* Pursuant to Title VIII, Pub. L. 97-320, housing creditors that are not commercial banks, credit unions, or Federal savings associations may make alternative mortgage transactions (as defined by section 803 of Pub. L. 97-320 and as further defined and described by applicable regulations identified herein) notwithstanding any state constitution, law or regulation. ***In accordance with section 807(b) of Pub. L. 97-320, the provisions listed below are identified as appropriate and applicable to the exercise of this authority, and all regulations not identified herein are deemed inappropriate and inapplicable***: Section 545.32(b)(3) [amortization] and (b)(4) [interest rate adjustments], § 545.33(a) [amortization] and (c) [interest rate adjustments], and § 563.99 [disclosure and notice]. Housing creditors engaged in credit sales should read the term 'loan' as 'credit sale' wherever appropriate. [Emphasis added.]" 48 Fed.Reg. 23032 (April 23, 1983).

2. The 1996 Adoption of 12 C.F.R. § 560.220

In 1996, the OTS reorganized its lending and investment regulations. 61 Fed.Reg. 50951 (Sept. 30, 1996). As part of that reorganization, the preemption provisions of former 12 C.F.R. § 545.33(f) were modified and moved to a new 12 C.F.R. § 560.220. 61 Fed.Reg. 50951, 50955. With the adoption of 12 C.F.R. § 560.220, section 545.33 was removed. 61 Fed.Reg. 50951, 50971.

The rule promulgated in 1996 reads as it does today:

"12 C.F.R. § 560.220 Alternative Mortgage Parity Act

> "Pursuant to 12 U.S.C. 3803, housing creditors that are not commercial banks, credit unions, or Federal savings associations may make alternative mortgage transactions as defined by that section and further defined and described by applicable regulations identified in this section, notwithstanding any state constitution, law, or regulation. In accordance with section 807(b) of Public Law 97–320, 12 U.S.C. 3801 note, §§ 560.33 ["Late Charges"], 560.34 ["Prepayments"], 560.35 ["Adjustments to Home Loans"], and 560.210 ["Disclosures for Variable Rate Transactions"] of this part are identified as appropriate and applicable to the exercise of this authority and all regulations not so identified are deemed inappropriate and inapplicable. Housing creditors engaged in credit sales should read the term 'loan' as 'credit sale' wherever applicable." 61 Fed.Reg. 50951, 50983.

The amendment and renumbering of the regulation is significant because OTS had originally proposed "moving paragraph (f) [of 12 C.F.R. § 545.33] in order to make it more accessible and easier to locate ***and to clarify that all OTS lending regulations apply to loans originated under the Parity Act.*** [Emphasis added.]" 61 Fed.Reg. 50951, 50955. However, that proposed extension of the Parity Act's regulations was not adopted.

Instead, in the "Section by Section Analysis" commentary by the OTS, the agency specifically stated that it had chosen not to regulate all activities of state licensed lenders in alternative mortgage transactions:

"Section 560.220 Alternative Mortgage Parity Act

"This section (originally proposed as § 560.210) is derived from current § 545.33(f), 'Notice of housing creditors regarding alternative mortgage transactions' and applies to state savings associations and certain other state-chartered lenders. OTS has observed that state housing creditors interested in engaging in alternative mortgage transactions could not easily locate § 545.33(f). Placing these provisions into a subpart specifically dealing with alternative mortgages will make them more accessible. The section has been streamlined and modified to remove cross-references to repealed provisions and to clarify the scope of federal lending regulations applicable to state housing creditors electing to originate loans under the Parity Act. ***While the proposal indicated that all of new Part 560 would be considered appropriate and applicable to the exercise of the authority under the Parity Act, the final rule has been revised to identify the appropriate sections with greater specificity.*** [Emphasis added.]" 61 Fed.Reg. 50951, 50969.

This commentary clearly shows that the OTS did not intend to regulate the entire field of alternative mortgage lending by nonfederally-chartered lenders. Instead, it only chose to identify its regulations relating to late charges, prepayments, adjustments to home loans, and disclosures for variable rate transactions as "appropriate and applicable" to the exercise of its regulatory authority over reverse mortgage transactions. The present OTS regulation specifically states that all other regulations "are deemed inappropriate and inapplicable" to the exercise of its

regulatory authority over reverse mortgage transactions. 12 C.F.R. § 560.220.

Since 12 C.F.R. § 560.220 was implemented in 1996, Congress has not acted to repudiate the OTS' determination that only limited federal regulation – and thereby only limited preemption of state regulation – of alternative mortgage lending was "appropriate and applicable" to its exercise of authority under the Parity Act. This is persuasive evidence that the OTS' interpretation of the scope of its authority under the Parity Act is the one intended by Congress. *Zemel v. Rusk*, 381 U.S. 1, 11, 14 L.Ed.2d 179, 85 S.Ct. 1271 (1965).

3. Public Statements by the Director of the OTS and One of the Authors of the Parity Act Support a Construction of Limited Scope of Preemption

The limited nature of the Parity Act's preemptive scope has also been acknowledged in the more recent statements of Ellen Seidman, Director of the OTS. On April 5, 2000, the OTS issued an advanced notice of a proposed rulemaking ("ANPR") in the Federal Register entitled "Responsible Alternative Mortgage Lending." *See* 65 Fed.Reg. 17811 (April 5, 2000). In the ANPR, the Director sought public comment on potential federal regulations to control predatory lending practices in the alternative mortgage industry. In addition, the Director reviewed the background of OTS' lending regulations under the Parity Act and state initiatives to address predatory lending. 65 Fed.Reg. 17811, 17812-17815.

In addressing whether the OTS should modify its regulations implementing the Parity Act, the Director

acknowledged the continuing vitality of state regulation in areas not specifically covered by the Parity Act:

> "The Parity Act, as discussed above, authorizes housing creditors to make alternative mortgage loans as long as the transactions are 'in accordance with' appropriate and applicable OTS regulations. The Act does not grant housing creditors the same powers as federal savings associations outside of the context of alternative mortgage transactions. ***Even within that context, state law governs those aspects of a housing creditor's operations not covered by regulations designated as applicable to alternative mortgage transactions under the Parity Act. The limited role the Parity Act plays in the overall regulation of housing creditors has not always been clearly understood.*** [Emphasis added.]" 65 Fed.Reg. 17811, 17815-17816; *see Black*, 92 Cal.App.4th at 933-934.

In her May 24, 2000, testimony before the House Committee on Banking and Financial Services on "Predatory Lending Practices," Director Seidman commented directly on the issue now before this Court:

> "[L]et me say that even when we have the Parity Act at work, many, many, many things are not preempted. HOEPA is not preempted; Fair Lending is not preempted; State civil and criminal fraud penalties are not preempted. What we are talking about here are a limited number of loan terms and that is why we have the ANPR out to ask whether we should make some changes." (Transcript of Hearing, 5/24/00, p. 53.)

Director Seidman's interpretation is further buttressed by comments of Representative John LaFalce (D-N.Y.) at the same May 24, 2000, hearing on "Predatory Lending Practices." Representative LaFalce, one of the two members of the House Committee on Banking and Financial Services who had co-sponsored the Parity Act, discussed the appropriate standard of construction which he felt should be used to determine whether Congress intended to preempt State consumer protection laws:

> "Let me first address the always-present tension between Federal law and State law, Federal regulation and State regulation. I think, as a general rule, we must understand that Federal law can preempt actions of the State, but that very, very frequently, it is not the intent of Federal law to preempt, especially when consumer protections are concerned and the State is advancing greater consumer protections than might exist under Federal law.
>
> "Further, in order for the Federal law to preempt, usually we must speak explicitly to the issue of preemption. In the absence of explicit language, in dealing with a State consumer protection, it is my judgment that deference should be given to the State consumer protection, as a matter of general construction. We will have more dialogue about that in the future. That is not always the case, but it seems to me that should be a general rule of construction.
>
> "To go to the specific issue of predatory lending, we have some individuals who say there is ample regulatory authority to deal with the problems of predatory lending if only the regulators would use it. We have some who say it is imperative that we have new legislation. I suspect that both

are correct. . . . " (Transcript of Hearing, 5/24/00, p. 57.)

Thus, one of the co-sponsors of the Parity Act has stated that: (1) federal laws should be construed as deferring to state consumer protection in the absence of explicit Congressional language; and (2) states have authority to deal with predatory lending practices such as alleged in respondent's complaint.

Despite petitioners' desire to make it appear otherwise, the California Court of Appeal's opinion in *Black* correctly delineates the limited scope of federal preemption under the Parity Act.

II. THE OPINION OF THE CALIFORNIA COURT OF APPEAL DOES NOT CONFLICT WITH THE OPINION OF ANY OTHER COURT

A. The Parity Act Cases Cited by Petitioners Do Not Conflict with the *Black* Decision

Although petitioners contend otherwise, the opinion in *Black* is not in conflict with decisions of any other court. Respondent does not dispute that the Parity Act preempts state regulation of prepayment penalties or fees under 12 C.F.R. § 560.34. *National Home Equity Mortgage Assn. v. Face*, 239 F.3d 633 (4th Cir. 2001) ("*Face*"); *Shinn v. Encore Mortgage Services, Inc.*, 96 F.Supp.2d 419 (D.N.J. 2000) ("*Shinn*"). However, neither *Face* nor *Shinn* addressed the issue of the Parity Act's preemption of state laws dealing with unfair business practices, fraud, or elder abuse, or indeed the preemption of any state law other than those which attempt to regulate prepayment of penalties or fees.

As the *Black* court explained at length, neither *Face* nor *Shinn* supports petitioners' preemption argument. *Black,* 92 Cal.App.4th at 934-936. The *Black* court properly found that *Face* does not provide "much assistance" in resolving this case because it concerns preemption of state laws limiting prepayment fees, "a subject addressed in a federal regulation specifically identified in [12 C.F.R. §] 560.220 as applicable to nonfederally-chartered housing creditors." *Black,* 92 Cal.App.4th at 934. The *Black* court also properly found "*Shinn* . . . similarly uninstructive because it also considers whether the Parity Act preempts a state law prohibiting prepayment fees. [Citation.]" *Black,* 92 Cal.App.4th at 935.

The court in *Ansley v. Ameriquest Mortgage Co.*, 194 F.Supp.2d 1062 (C.D.Cal. 2002), recently recognized the limited scope of the decisions in *Face* and *Shinn*. In *Ansley*, a mortgagor brought a state court action against his mortgagee claiming that the mortgage's prepayment penalty assessment provisions violated California's Consumer Legal Remedies Act, Civil Code §§ 1770, *et seq.*, and unfair business practices laws, California Business & Professions Code §§ 17200, *et seq*. The defendant mortgagee removed the action to federal court and the plaintiff moved for remand to state court and for award of attorney fees. In its order remanding the case, the *Ansley* court held that the plaintiff's claim was not completely preempted by the Parity Act, and awarded plaintiff attorney fees because the "defendant did not, and presumably cannot, provide any authority in support of its argument that the Parity Act completely preempts California law so as to justify removal." *Ansley*, 194 F.Supp.2d at 1065.

The *Ansley* court found, as did the court in *Black*, that the decisions in *Face*, 239 F.3d 633, and *Shinn*, 96

F.Supp.2d 419, were distinguishable: "While these cases dealt with whether the Parity Act preempted state law, neither case held that the Parity Act completely preempted state law so as to confer exclusive federal jurisdiction. [Citations.]" *Ansley*, 194 F.Supp.2d at 1065.

Petitioners made no attempt to remove this matter to federal court, and have thereby implicitly conceded that the Parity Act does not completely preempt respondent's claims.[1]

Petitioners ask this Court to consider the reasoning of a third case, *First Gibralter Bank, FSB v. Morales*, 19 F.3d 1032 (5th Cir. 1994), a decision that was vacated a year after it was published. *See First Gibralter Bank, FSB v. Morales*, 42 F.3d 895 (5th Cir. 1995). In its 1994 decision, the Fifth Circuit considered whether *former* 12 C.F.R. § 545.33(f) preempted Texas' homestead law to the extent that the homestead law acted to prohibit federally regulated housing creditors from offering reverse mortgage loans. *First Gibralter,* 19 F.3d at 1052-1053. The vacated 1994 *First Gibralter* opinion deals with a repealed regulation in a case involving a Texas law that had the effect of preventing Federal associations from offering reverse annuity mortgages to certain borrowers. The reasoning in *First Gibralter* is not instructive with regard to this matter as the issues here do not include an outright ban on reverse mortgages, the powers of federally-chartered associations, or the scope of Texas law.

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[1] As more fully discussed, *infra*, petitioners' initial position as argued in their motion for summary judgment was that respondent's claims were completely preempted.

B. The Other Cases Cited by Petitioners Do Not Conflict with the *Black* Decision

Petitioners also cite several other cases which they contend support their position. Petitioners are incorrect.

In *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 159, fn. 14, 73 L.Ed.2d 664, 102 S.Ct. 3013 (1982), this Court specifically declined to hold that federal regulations preempt *all* state laws in the "entire field of federal savings and loan regulation."

In *Washington Mutual Bank, FA v. Superior Court*, 95 Cal.App.4th 606, 621 (2002), the court held that plaintiffs' claims that defendant improperly charged preclosing interest on loan proceeds once those proceeds were made available to the borrower through escrow by wire or electronic transfer were preempted by HOLA. Contrary to the inference petitioners seek to draw from that holding, the *Washington Mutual* court recognized that HOLA "does not 'preempt the application of all state and local laws' pertaining to federal savings and loans." *Washington Mutual*, 95 Cal.App.4th at 620. Instead, the *Washington Mutual* court narrowly held that plaintiffs' claims relating to "the amount of interest charged over the life of the loan, and the timing of the disbursal of loan proceeds" were preempted by the effect of 12 C.F.R. § 560.2(b)(4), one of the specific "illustrative examples" of the types of state laws identified by the OTS as preempted by HOLA. *Washington Mutual*, 95 Cal.App.4th at 621.

In *Federal Savings & Loan Ins. Corp. v. Kidwell*, 716 F.Supp. 1315, 1317 (N.D.Cal. 1989), *vacated on other grounds sub nom. Eureka Federal Savings and Loan Ass'n v. Kidwell*, 937 F.2d 612 (9th Cir. 1991), FSLIC and Eureka Federal Savings brought state law claims for negligence

and waste against Eureka's former officers, directors and employees alleging gross violations of prudent lending practices committed during their tenure. The district court held that the state law claims were preempted because they addressed the "subject of operations" of the federally chartered savings and loan. *Kidwell*, 716 F.Supp. at 1316-1317.

Here, the claims of unfair business practices, elder abuse, and fraud do not address petitioner's operations. In *Fenning v. Glenfed, Inc.*, 40 Cal.App.4th 1285, 1298-1299 (1995), *rev. den.*, the California Court of Appeal held that HOLA did not preempt state law claims against a federal savings and loan for unfair business practices:

> "[A]ctions for fraud are governed almost exclusively by state law, and do not raise issues of great federal interest. There is no reason to suppose that Congress intended to preempt common law tort claims, effectively granting savings associations immunity from such state law claims and a number of courts have so held. . . . And the Bank's argument that, by permitting fraud and unfair trade practices suits, the state is regulating the Bank's conduct, is off the mark. Plaintiff's ability to sue the Bank for fraud does not interfere with what the Bank may do, that is, how it may conduct its operations; it simply insists that the Bank cannot misrepresent how it operates, or employ fraudulent methods in its operations. Put another way, the state cannot dictate to the Bank how it can or cannot operate, but it can insist that, however, the Bank chooses to operate, it do so free from fraud and other deceptive business practices. [Citations and footnote omitted.]"

Thus, none of the cases discussing the preemptive effect of federal banking laws on which petitioners rely support their preemption argument.

III. THE DECISION OF THE *BLACK* COURT IS CONSISTENT WITH OTHER DECISIONS ON THE SCOPE OF PREEMPTION OF STATE LAW BY FEDERAL BANKING LAW

Petitioners argue that state-chartered alternative mortgage lenders must be treated as if they were federally chartered lenders regulated by HOLA for purposes of preemption analysis. Assuming, *arguendo*, that to be true, courts have consistently found that HOLA does not preempt state law claims for unfair business practices, fraud, or breach of contract. *See* 12 C.F.R. § 560.2(c).

Thus, other California courts dealing with issues of the scope of federal banking law preemption have reached conclusions which are consistent with the decision in the instant case. In *People ex rel. Sepulveda v. Highland Federal Savings & Loan*, 14 Cal.App.4th 1692, 1708 (1993), *reh. den., cert. den.*, 510 U.S. 928, the court held that HOLA did not preempt a claim for violation of California Business & Professions Code § 17200. In *Siegel v. American Savings & Loan Assn.*, 210 Cal.App.3d 953 (1989), the court held that HOLA did not preempt the plaintiffs' claims for, *inter alia*, civil conspiracy, unfair competition, and fraud.

Similarly, a significant number of federal courts and other state courts have held that federal banking laws do not preempt state law claims arising out of unfair business practices, tort, and breach of contract. *See, e.g.*: *Federal Deposit Insurance Corporation v. Stahl*, 89 F.3d 1510 (11th Cir. 1996) [HOLA does not preempt claim by FDIC against

directors of failed savings and loan for negligence]; *Flanagan v. Germania*, 872 F.2d 231, 234 (8th Cir. 1989) [HOLA does not preempt state claim for tortious interference with contract]; *Pena v. Downey Savings and Loan Assn.*, 929 F.Supp. 1308 (C.D.Cal. 1996) [HOLA does not preempt an employee's action for civil rights violations and defamation against a savings and loan]; *Morse v. Mutual Federal Savings & Loan Assn. of Whitman*, 536 F.Supp. 1271, 1280-1281 (D.C.Mass. 1982) [HOLA does not preempt award of attorneys fees and punitive damages in an unfair trade practice action against a federal savings and loan]; and *First Federal Savings & Loan Assn. of Hazelton v. State Treasurer*, 650 A.2d 1166, 1168-1169 (Pa.Cmwlth. 1994) [HOLA does not preempt state contract claim].

Cases in which federal or other state courts have held that HOLA does not preempt complimentary state regulations include: *Livingston v. Vanguard Federal Savings Bank*, 563 A.2d 175, 178-180 (Pa.Super. 1989) [HOLA does not preempt Pennsylvania ban on imposition of prepayment penalties on mobile home installment sales contracts]; and *Spitz v. Goldome Realty Credit Corporation*, 569 N.E.2d 43 (Ill.App. 1991) [HOLA did not preempt an action under the Illinois Mortgage Escrow Account Act against a state servicing subsidiary of a federal savings association].

A number of other cases support the finding that respondent's claims are not preempted even though the cases deal with federal banking laws other than the Parity Act and HOLA.

In *O'Melveny & Meyers v. FDIC*, 512 U.S. 79, 129 L.Ed.2d 67, 114 S.Ct. 2048 (1994), this Court held that California law was not preempted by FIRREA in an action

for professional malpractice and breach of fiduciary duty by the FDIC against former attorneys for a failed savings and loan.

In *Beffa v. Bank of the West*, 152 F.3d 1174, 1177 (9th Cir. 1998), the Ninth Circuit held that the Expedited Funds Availability Act does not preempt state negligence or misrepresentation causes of action. In *Sharpe v. FDIC*, 126 F.3d 1147 (9th Cir. 1997), the Ninth Circuit held that state law claims for breach of contract, rescission, and declaratory relief against the FDIC were not preempted by FIRREA.

In *Peatros v. Bank of America*, 22 Cal.4th 147 (2000), the California Supreme Court held that a section of the National Bank Act, 12 U.S.C. § 24, Fifth, did not preempt a bank manager's claims for discrimination and wrongful termination.

In *Briggs v. Countrywide Funding Corp.*, 949 F.Supp. 812, 814 (M.D.Ala. 1996), the district court held that RESPA does not preempt state disclosure laws which require additional disclosures to borrowers. In *Kenney v. Farmers National Bank of Opelika*, 938 F.Supp. 789 (M.D.Ala. 1996), the district court held that the National Bank Act does not "completely preempt" state claims challenging insurance premiums charged by national bank. In *Smith v. Beneficial Bank USA*, 971 F.Supp. 513 (M.D.Ala. 1997), the district court held that an action for fraud was not "completely preempted" by the National Bank Act. In *Tuxedo Beach Club Corp. v. City Federal Savings Bank*, 749 F.Supp. 635, 648-649 (D.N.J. 1990), the district court held that a cause of action for fraud under the New Jersey Consumer Fraud Act ("CFA") was not preempted by

FIRREA or "any other federal statute which would conflict with a private right of action under CFA."

In *People v. Abedi*, 595 N.Y.S.2d 1011, 1015-1016 (1993), the New York court held that New York State's criminal prosecution of bank officers and directors for fraud, conspiracy, and falsification of business records was not preempted by the Federal Bank Holding Company Act and was supported by a "Statement of Interest" submitted in the action by the Federal Reserve Board welcoming New York's "vigorous prosecution."

The uniformity of these decisions adds substantial support to the decision of the *Black* court.

IV. PETITIONERS FAIL TO STATE A NUMBER OF SIGNIFICANT FACTS AND MISSTATE THE RECORD IN SEVERAL AREAS

A. Petitioners' Recitation of the Facts Is Argumentative and Fails to Adequately Describe the Allegations of Respondent's Complaint

Petitioners' recitation of the "facts" of the underlying transaction is not supported by the record. Petitioners' "factual" recitation should be recognized for the plain argument that it is because, as yet, there has been no determination of any factual issues by the trial court.

Indeed, on appeal, petitioners sought affirmance of the trial court's order granting summary judgment on the ground that there was no factual basis for any of the Blacks' claims. The California Court of Appeal expressly rejected that request without prejudice, holding that petitioners' "arguments concerning the Blacks' claims were not presented to any material extent at all in [their]

motion for summary judgment. . . . " *Black*, 92 Cal.App.4th at 925, fn. 9.

Petitioners fail to completely describe the factual basis for the claims set forth in respondent's complaint which alleges, *inter alia*, that: (i) the transaction at issue was a fraudulently disguised sale of seventy percent (70%) of the equity in her home in return for payment of less than thirty percent (30%) of its value; (ii) petitioners made written misrepresentations that there would be "no prepayment charges" yet the transaction – if viewed as a loan – requires prepayment of some twenty-four (24) years worth of interest; and (iii) petitioners fraudulently inflated the Blacks' life expectancies by some twenty percent (20%) in calculating the amounts payable under the annuity purchased by the Blacks and the amounts due under the "reverse mortgage," thereby decreasing the Blacks' annuity payments and increasing their debt.

Petitioners offered no evidence in their motion for summary judgment to refute any of those allegations, nor did they identify any federal law which would allow such conduct. As previously discussed, petitioners' failure of proof was a significant reason the California Court of Appeal reversed the trial court's order granting summary judgment. *Black*, 92 Cal.App.4th at 925, fn. 9.

B. Petitioners' Own Evidence Raised a Triable Issue of Fact on the Issue of Preemption

One of the exhibits submitted by petitioners to the trial court itself raised a dispute of material fact as to whether federal preemption applies at all to the particular transaction at issue. The "Deed of Trust" attached as

Exhibit F to petitioners' motion contains the following provision on p. 13:

> "7.14 *Governing Law; Severability; Headings.* ***The Loan Documents shall be governed by, and construed in accordance with the laws of the State of California.***" (2 JA 383; emphasis added.)[2]

Even assuming that federal law preempted respondent's claims, petitioners' own evidence establishes that petitioners elected to enter into a transaction governed by California law. *See United States v. Stewart*, 523 F.2d 1070, 1072 (9th Cir. 1975). Thus, petitioners' own evidence raises a triable issue of material fact as to the issue of whether petitioners waived federal preemption. Therefore, this case will turn upon its own facts and will affect few persons other than the litigants.

C. Petitioners Offered the Interpretive Letter from the Office of Thrift Services That They Now Claim the Court of Appeal Erred in Considering

Petitioners argue that the California Court of Appeal erred in relying on a February 10, 1997, interpretive letter from the OTS, and claim that the letter is "entitled to little deference." In that letter, the Chief Counsel of the OTS informs the inquiring state-licensed alternative mortgage lender: (1) it may make alternative mortgage loans; (2) it

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[2] As used in this opposition, "# JA #" refers to the volume and page of the Joint Appendix submitted by the parties to the California Court of Appeal in lieu of a Clerk's Transcript pursuant to California Rules of Court, rule 5.1.

must comply with OTS regulations relating to late charges, prepayments, adjustments to home loans, and disclosures for ARM's; and (3) "[***a***]***s long as the Company complies with the requirements of these OTS regulations in making and enforcing its ARM loans, the Company need not comply with conflicting or inconsistent state restrictions***. [Emphasis added.]" (5 JA 913.)

Petitioners fail to inform this Court that they originally offered the 1997 interpretive letter to the trial court in support of their motion for summary judgment. Petitioners also fail to inform this Court that they cited that same letter in their brief to the California Court of Appeal: "The Office of Thrift Supervision ('OTS') – ***whose words have the force of Congressional enactments as to mortgage lending regulation*** – has repeatedly recognized that the Parity Act 'preempts state laws that prohibit or impede alternative mortgage transactions. [Emphasis added.]' OTS Letter P-97-1, February 10, 1997 at 2; and OTS Letter P-96-13, November 27, 1996 at 2. 4 JA 911-912, 918-919." *Respondents' Brief,* 1/16/2001, p. 24.

To the extent that consideration of the opinion letter was error, it was invited by petitioners. *Mercer v. Theriot*, 377 U.S. 152, 154, 12 L.Ed.2d 206, 84 S.Ct. 1157 (1964).

Consideration of the letter was not error. It was thorough, properly reasoned, and consistent with other OTS pronouncements. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 89 L.Ed. 124, 65 S.Ct. 161 (1944).

D. Petitioners Failed to Offer any Evidence to Support Their Standing to Claim Preemption

Petitioners introduced no evidence in support of their motion for summary judgment to show that any of the petitioners is or was licensed by the State of California. Thus, assuming *arguendo* that the Parity Act preempts a part or all of respondent's claims, petitioners failed to show that they had standing to claim protection under the Parity Act.

In order to claim any protection under the Parity Act, a lender must qualify as a "housing creditor." Under 12 U.S.C. § 3802:

> "A person is not a 'housing creditor' with respect to a specific alternative mortgage transaction if, except for this chapter, in order to enter into that transaction, the person would be required to comply with licensing requirements imposed under State law, ***unless such person is licensed under applicable state law and such person remains, or becomes, subject to the applicable regulatory requirements and enforcement mechanisms provided by State law***. [Emphasis added.]"

Petitioners failed to introduce evidence to show that any of the petitioners were licensed under state law and remain subject to state law, and therefore fell within the Parity Act's definition of "housing creditor." It is clear why petitioners did not do so. As the *Black* court observed, the very definition of "housing creditor" as one who is subject to "applicable regulatory and enforcement mechanisms" of state law provides authority for the conclusion that the Parity Act does not preempt all state laws relating to

alternative mortgage transactions. *Black*, 92 Cal.App.4th at 930.

E. Petitioners' Stance on the Scope of Preemption Has Been Inconsistent

Petitioners' stance on the scope of preemption has been inconsistent. On January 21, 2000, petitioners argued to the trial court that "comprehensive provisions of federal law operate together to grant ***complete federal control and preemption*** over the making and administration of [the Blacks'] loan. [Emphasis added.]" (2 JA 261.) Respondent submitted authorities which refuted that contention. (5 JA 1087-1088.) Then, on May 30, 2000, petitioners argued to the trial court that federal banking laws did not "completely preempt" state banking laws, claiming they had never taken such a position. (6 JA 1310-1312.)

Petitioners now seem to have returned to their original, and still erroneous stance.

V. CONCLUSION

For all of the foregoing reasons, respondent Corinne Black, Surviving Trustee of the Charles T. Black and Corinne E. Black Trust Agreement dated April 20, 1982,

respectfully requests that this Court deny the petition for a writ of certiorari.

Respectfully submitted,

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